Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1996

ANN ERWIN, et al.,

*Petitioners,*

v.

RICHARD M. DALEY, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

KIMBERLY A. SUTHERLAND
180 West Washington Street
Suite 700
Chicago, IL 60602
(312) 726-0045

*Counsel for Petitioners*
*Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

After *Richmond v. Croson*, did this Court clearly establish the law, so that City of Chicago officials should have been denied summary judgment on the issue of qualified immunity for reverse discrimination in police promotions, where the City officials did not have a narrowly tailored plan to serve a compelling governmental interest?

After *Croson*, should City officials have known that the continuation of two decades of race-based quotas, engineered to create racial balance between the general population and each rank of the Chicago police department, violated the equal protection clause?

Did the Seventh Circuit erroneously reverse the district court, and, in conflict with the Fourth Circuit's opinion in *Alexander v. M.H. Estepp*, 95 F.3d 312 (4th Cir. 1996), incorrectly conclude that *Croson* was not dispositive, and that the law in this area was "sufficieintly unsettled" after *Croson*, so that "one cannot conclude that the City officials violated clearly established statutory or constitutional rights of which a reasonable person would have been aware"? (App. 1-2)

## PARTIES TO THE PROCEEDINGS

The Erwin petitioners are listed in the Appendix, attached hereto.

The respondents are RICHARD M. DALEY, GLENN CARR, KELLY WELSH, EUGENE SAWYER, JESSE HOSKINS, ROBERT JOYCE, JUDSON MINER, BRIDGET ARIMOND, LEROY MARTIN, GERALD COOPER, EDWARD BROOKS, and HUBERT HOLTON.

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## PETITION FOR A WRIT OF CERTIORARI

The ERWIN petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, to resolve a conflict between the Fourth Circuit and Seventh Circuit on the issue of qualified immunity for public officials, for reverse discrimination committed after this Court's decision in *Richmond v. Croson.*

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 92 F.3d 521 (7th Cir. 1996). It is reprinted in the Appendix. (App. 1). By order of September 18, 1996, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc. (App. 13).

The opinion of the United States District Court Judge Paul Plunkett is not reported, and is reprinted in the Appendix. (App. 15).

## JURISDICTION

On August 8, 1996, the Court of Appeals for the Seventh Circuit entered the judgment sought to be reviewed. On September 18, 1996, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### History of racial quotas in the CPD

Until the late 1960's, United States District Court Judge Prentice Marshall found that the racial composition of the Chicago Police Department (CPD) mirrored the general population, *U.S. v. City of Chicago*, 411 F. Supp. 218, 244 (N.D.Ill.1976).

In the early 1970's, Judge Marshall began two decades of hiring and promotion quotas for blacks and Hispanics that far exceeded their applicant pools, to bring the CPD into racial balance with the growing black and Hispanic population. Judge Marshall did not tailor the applicant pool to those who were qualified for the job of police officer. *U.S. v. City of Chicago*, 411 F. Supp. 248-250.

In the opinion sought to be reviewed, the Seventh Circuit mistakenly assumed there was a prior judicial finding of discrimination without citation to such a finding. (App. 7). In an earlier opinion, the Court of Appeals

reversed Judge Marshall's finding of purposeful racial discrimination:

> "We reverse the district court's holding of a constitutional violation as to racial discrimination. . . .
>
> "There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination."
>
> *U.S. v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977), reversing 411 F. Supp. 218.

In the early 1970's, the United States' Law Enforcement Assistance Administration report found no intentional discrimination, and found the CPD had engaged in intensive minority recruiting. R. (91 C 668 Vol. 6) 441, Ex. JJ, pp. 3-4.

The two decades of hiring and promotion quotas are detailed in the following paragraphs A-C:

**A. Police Officer hiring**

For the 1971 CPD hiring test, the only CPD hiring test challenged in court, Judge Marshall ordered quotas for black and Hispanic males of 42%, when these groups were 20% of the general population, *U.S. v. City of Chicago*, 411 F. Supp. 218, 242 (1976).

The court-ordered hiring quotas ended in 1976, however the City of Chicago ("City") continued to impose hiring quotas voluntarily. R. (91 C 668, Vol. 5) 392, Pl. 12(n), pp. 5-6.

### B. Sergeant promotions

Before the 1987 lieutenants' test, there were only two sergeants' tests in the prior 19 years: the 1973 and 1978 tests. Judge Marshall imposed 40% minority male quotas upon both the 1973 and 1978 sergeants' lists, – double the applicant pool of minorities. Approximately 75% of the black sergeants who took the 1987 lieutenants' test, at issue in the present case, had been promoted to sergeant by the quotas. R. (91 C 668 separately bound exhibits) 510-1, Pl. Exs. B, C & D.

After 1981, the racial quotas continued at a reduced rate of 25%, even though parity had already been achieved between the patrol force and sergeants' rank, *U.S. v. City of Chicago*, 663 F.2d 1354, 1361 (7th Cir. 1981).

### C. Lieutenant promotions

Before the 1987 lieutenants' test, the City had given only 2 police lieutenants' tests in the prior 20 years: the 1970 and 1977 tests.

For the 1970 lieutenants' list, Judge Marshall found *no* adverse racial impact, and dismissed a court challenge to that list, *U.S. v. City of Chicago*, 411 F. Supp. 239-240.

For the 1977 lieutenants' test, Judge Marshall imposed quotas to equalize the promotions in 1984, after he found adverse impact, and after the City, under the Harold Washington administration, failed to defend its

test as job-related.[1] R. (91 C 668, Vol. 5) 372, City's Ex. A, p. 20; R. (91 C 668 separately bound exhibits) 510-1, Pl.'s Ex. D). (DALEY brief on appeal, p. 10; DALEY appendix on appeal, A-69).

**End of court approval of quotas in 1988**

On November 21, 1988, before the promotion quotas imposed in July, 1990, that are the subject of this case, Judge Marshall stated he was ending his approval of promotion quotas designed to make sergeant and lieutenant ranks reflect the rank below, calling such quotas an "anathema" and "vexatious":

> ". . . . The City urges that these ratios are necessary in order that the gender and ethnicity of those holding the rank of sergeant will mirror those gender and ethnicity in the rank of patrol officers. . . .
>
> "We have concluded that the time has come to end court imposed promotion quotas with respect to the rank of sergeant just as we have ended hiring quotas with respect to patrol officers and promotion quotas with respect to lieutenants."

---

[1] Contrary to the Seventh Circuit misapprehensions (App. 2-3), Judge Marshall's order to equalize promotions applied only to the 1978 lieutenants' list, not the 1988 list that is the subject of the present case. Further, Judge Marshall's order mandating quotas was not affirmed in *Bigby v. City of Chicago*, 766 F.2d 1053 (slip.op.2). That opinion only affirmed the denial of relief to the Thoele intervenors on due process grounds, and did renew the order mandating quota promotions.

(Ex. B to "Erwin Appellees' Motion to Cite Additional Authority", granted by Court of Appeal's order of December 12, 1995).

**Challenged conduct/goal of parity**

In and after July, 1990, in disregard of Judge Marshall's disapproval of continued quotas, City officials made race-based, non-rank order promotions from the 1988 Chicago police department (CPD) lieutenants' list, which had been formulated two years earlier with racially altered, or "standardized", scores. The officials promoted blacks and Hispanics to reach a quota of 120% of eligible blacks and Hispanics, restricting whites, male and female, to a rate of 80% of eligible whites.

The City officials expressly stated they undertook the racial quotas in 1990 for the purpose of reaching racial "parity" and "enhancing racial representatives in upper ranks". (DALEY brief on appeal, pp. 43-44, 49, 56). A total of seventeen lieutenants were promoted in non-rank order from the already racially altered list. The Seventh Circuit misapprehended that only four lieutenants were promoted in non-rank order from the list. (App. 3) R. (91 C 668 Vol. 5) 360, pars. 32-33, 38-39, 41-42, 44).

The City officials based their parity goal on all officers who where "eligible" for promotion to lieutenant by virtue of being a sergeant, which included officers who did not pass the 1987 lieutenants' promotion test, from which the 1998 list was forumulated. (App. 3) Officers who do not pass the test are not qualified to be promoted, according to the officials. R. (91 C 668 Vol. 5) 378, City's 12(m), par. 98. The test was "job-related", and "persons at

the top of the list are better qualified than those at the bottom", according to the officials. R. (91 C 668 Vol. 5) 378, City's 12(m) par. 40 (3); R. (91 C 668) 372 (First Joyce Aff., City Ex. D, p. 6, par. 10) (City's Ex. C, p. 4) R. (91 C 668 Vol. 5) 392, p. 10, par. 8.

The 1987 lieutenants' test was designed by black officers and their lawyers, whom the City consulted "on virtually every aspect of the construction, administration and scoring of the 1987 lieutenant examination". R. (91 C 668 Vol. 5) 378, City's 12(m) par. 20; (DALEY brief on appeal, p. 10). R. (91 C 668 Vol. 5) 410, Pl. Exs. Volume III, R. (91 C 668, separately bound exhibits) (510-2, Pl.s' Ex. E) (ERWIN Appendix to brief on appeal, A-51, par. 9).

The Seventh Circuit misapprehended that the City altered the scores on the 1988 lieutenants' list because its "statistical analysis . . . revealed significant variation in the candidates' scores based on the race of the officer taking the examination and the race of the rater who scored it" (App. 2-3). In actuality, the officials' own document shows that there was no such variation. R. (91 C 668 Vol. 5) 373, (Giganti Aff., City's Ex. O, Ex. 1 p. 2, 3 "Intra-rater Analysis").

The Seventh Circuit misapprehended that Judge Marshall approved the racially altered, or "standardized" scores on the underlying lieutenants' list. (App. 3). In actuality, Judge Marshall made clear that he was not approving the City's methods:

> "Out of an abundance of caution we make it clear that we have not approved the methods by which the City has arrived at the 1988 police

lieutenant promotional eligibility list." Memorandum opinion of Judge Marshall of March 14, 1988 in *Bigby v. City of Chicago*, 80 C 5246 (N.D.Ill.1984) R. (91 C 668 Vol. 5) 392, p. 21, par. 24, 26. (ERWIN appendix to brief on appeal, A-58 par. 17) R (91 C 668) 372, City's Ex. E, p. 3).

**District court's denial of summary judgment on qualified immunity for conduct after *Croson***

The ERWIN petitioners, who are largely white sergeants, male and female,[2] brought the present suit under 42 U.S.C. 1983, for the race-based lieutenant promotions, for violation of equal protection. The district court had subject matter jurisdiction over under 28 U.S.C. Sec. 1331, 1343(a)(3) and 1343(a)(4) (1988).

For promotions made before the decision in *Croson*, the district court granted summary judgment to the City officials on the issue of qualified immunity. For promotions made after *Croson*, in July 1990, the district court denied the City officials' motion for summary judgment on the issue of qualified immunity. The district court found the officials failed to present facts to show they complied with *Croson*. (App. 27-29).

The City officials appealed. The Seventh Circuit reversed, and granted summary judgment to the officials on the issue of qualified immunity, finding that *Croson* was not dispositive. (App. 1-2).

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[2] Some minority sergeants joined this suit, seeking merit-based promotions.

## REASONS FOR GRANTING THE WRIT

### I.

### AFTER *CROSON*, CITY OFFICIALS SHOULD HAVE KNOWN THAT RACE-BASED PROMOTIONS ENGINEERED TO RACIALLY BALANCE THE RANKS OF THE CHICAGO POLICE DEPARTMENT VIOLATED THE EQUAL PROTECTION CLAUSE, AND SHOULD HAVE BEEN DENIED QUALIFIED IMMUNITY.

Before July, 1990, this Court clearly established that reverse discrimination was presumptively unconstitutional under the Equal Protection Clause, and would be judged under a strict scrutiny standard, *Richmond v. J.A. Croson Co.*, 109 S.Ct. 707 (1989). This Court held that racial perferences are justified only in the "extreme case . . . to break down patterns of deliberate exclusion", *Id.*, 109 S.Ct. 729.

In *Croson*, this Court held that race-conscious remedies must be narrowly tailored to the objective of remedying lingering effects of identified past discrmination, or to serve some other compelling governmental interest, they must bear a relationship to actual harm caused, have reasonable time limits, must not unduly trammel upon whites, and race neutral alternatives must be explored.

In *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), this Court stated that its decision in *Croson* had made clear that states and cities were subject to strict scrutiny for race-based action:

> "With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny

> of all race-based action by state and local government." *Adarand,* 115 S.Ct. 2110.

In *Alexander v. M.H. Estepp,* 95 F.3d 312 (4th Cir.1996), the Fourth Circuit denied qualified immunity to public officials who engaged in reverse discrimination, but did not meet strict scrutiny under *Croson,* and particularly did not meet the requirement of narrow tailoring.

In the present case, beginning in July, 1990, the City officials promoted blacks and Hispanics to reach a quota of 120% of eligible blacks and Hispanics, restricting whites, male and female, to a rate of 80% of eligible whites. The City officials admittedly imposed the quota for the purpose of reaching racial "parity" and "enhancing racial representativeness in upper ranks". (DALEY brief on appeal, pp. 43-44, 49, 56). The officials admitted that their racial parity goals increase with the growing number of minorities in lower ranks, which, in turn, are filled by racial hiring and sergeant promotion quotas:

> " . . . the increasing minorities at lower ranks would cause racial disparity to increase over time unless additional steps were taken." (DALEY brief, p. 49).

The district court found that City officials did not present facts to show that reasonable officials would have believed they had complied with *Croson*:

> "the Defendants ignore *Croson* . . . they do not present enough factual evidence for us to independently determine that they complied with *Croson* . . . " (App. 27).

The Seventh Circuit reversed, finding that *Croson* was not dispositive and that the law in this area was "sufficiently unsettled" in and after 1990 that "one cannot conclude that the City officials violated clearly established statutory or constitutional rights of which a reasonable person would have been aware". (App. 1-2).

The Seventh Circuit stated that it is "possible" that the 1990 promotion procedures "pass the current legal tests, or they may not". This is clearly not the proper standard for granting the City officials summary judgment. (App. 11).

The Seventh Circuit mistakenly assumed there was a prior judicial finding of discrimination, without citation to any such finding. (App. 7). In an earlier opinion, the Court of Appeals reversed Judge Marshall's finding of purposeful racial discrimination:

> "We reverse the district court's holding of a constitutional violation as to racial discrimination. . . .
>
> "There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination."
>
> *U.S. v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977), reversing 411 F. Supp. 218.

Assuming, hypothetically, that there were a prior judicial finding of discrimination, that alone would not make race-based preferences legal under *Croson*. The officials would also have to show that a reasonable official would have believed there were present effects of past discrimination, and that they had a narrowly tailored plan to remedy those effects. In the present case, the

Seventh Circuit did not even address whether reasonable officials had a basis to believe that there were present effects of any past discrimination, nor to believe that the 120% quota was narrowly tailored to cure those effects.

In *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 1847-1848 (1986), this Court stated that racial preferences must not go on year after year based upon "year to year calibration".

In *Croson,* this Court condemned the goal of "outright racial balancing" *Id.,* 109 S.Ct. 728, because the goal has "no logical stopping point" and could extend until the percentage of minorities awarded public contracts "mirrored the percentage of minorities in the population as a whole", *Id.,* 109 S.Ct. 723.

> " . . . the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson,* 109 S.Ct. 728.

In the present case the ratio of white to minority officers did not result from prior race discrimination. To the contrary, the ratio was caused by two decades of hiring and promotion quotas, engineered to increase the number of blacks and Hispanics eligible for promotion from lower ranks. In an earlier decision, the Seventh Circuit observed that blacks and Hispanics seeking promotions in the Chicago police department are beneficiaries of past quotas, not victims of discrimination:

> "Today's beneficiaries of the decree, no matter their race or sex, are not victims of discrimination by the Police Department of Chicago . . .
>
> . . . . Many who seek promotions were brought into the force by the quotas in the decree; their

race and sex has worked in their favor. . . . " *U.S. v. City of Chicago,* 894 F.2d 943, 948-49 (7th Cir. 1990).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLY A. SUTHERLAND
180 West Washington Street
Suite 700
Chicago, IL 60602
(312) 726-0045

*Counsel for Petitioners*
*Counsel of Record*

In the

# United States Court of Appeals

## For the Seventh Circuit

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Nos. 95-1932, 95-1933 & 95-1934

ANN ERWIN, DWIGHT BLEKE, RICHARD MOELLER, et al.,
*Plaintiffs-Appellees,*

*v.*

RICHARD M. DALEY, GLEN CARR, KELLY WELSH, et al.,
*Defendants-Appellants.*

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Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 90 C 950, 90 C 1923, & 90 C 5456—**Paul E. Plunkett,** *Judge.*

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ARGUED DECEMBER 4, 1995—DECIDED AUGUST 8, 1996

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Before BAUER, DIANE P. WOOD, and EVANS,
*Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Although this case indirectly relates to the long-standing dispute about the process by which the Chicago Police Department (CPD) handled promotions in 1990, the direct question presented is whether the City officials before us were entitled to qualified immunity for the decisions they made at that time. The district court thought not, in light of the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which imposed stricter requirements on "affirmative action" plans than had existed theretofore. We find, however, that the law in this area

was sufficiently unsettled at that time that one cannot conclude that the City officials violated clearly established statutory or constitutional rights of which a reasonable person would have known. See *Behrens v. Pelletier*, 116 S.Ct. 834, 838 (1996). Accordingly, we reverse the district court's decision.

## I

Because our decision turns on the state of the law rather than the particular facts of the underlying litigation, we offer here only a summary of those proceedings. The story begins with Judge Prentice Marshall's 1973 injunction against the City, requiring it to refrain from using any promotional procedure, test, or standard that had an adverse impact on the promotion of African-Americans, Latinos, or women. Over the following years, the City worked to develop tests and procedures that would implement this command. In 1984, however, Judge Marshall ruled that the City's 1977 police lieutenant's promotional examination flunked the test because it had a disparate impact on African-American officers and there was no business necessity to justify promotions made in rank order from a list based on those exam results. He ordered the City to design a new lieutenant's promotional exam, to "equalize" promotions, and to award back pay in some circumstances. This Court affirmed that ruling in *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985).

As the district court had ordered, the parties went back to the drawing board and created a new examination, which had three parts: (1) a multiple choice section, used as a preliminary screening device, (2) written short answers, and (3) an oral interview. This new exam was administered to lieutenant applicants in 1987. After reviewing the results from the first two sections of the exam, the *Bigby* parties concluded that African-American and Latino officers continued to be adversely affected. They ordered a statistical analysis, which revealed significant variations in the candidates' scores based on the race of the officer taking the examination and the race of the

rater who scored it. Based on the *Bigby* order and this analysis, the officials responsible for the test decided to standardize the scores to take into account the difference in raters and applicant race. Roughly, this meant creating a relative score for each of the two groups (minorities and whites) that took into account raw scores, means, and dispersion of scores around the means, and then plugging that relative score back into a unified list. After completing that process, the parties drew up the 1987 promotional list, which Judge Marshall approved. In 1988, the City and police officials made 116 promotions to the rank of lieutenant from the approved 1987 list.

In 1990, the City and police department officials decided to take matters several steps further. They reviewed the rank of lieutenant to find out how many minority officers were included and compared that number to the percentage of minority officers in the rank below (sergeant), which was the group eligible for promotion. Again, the review showed that there was a statistically significant disparity between the two groups (*i.e.* fewer minority lieutenants than the sergeant numbers would suggest). The City officials decided to address the matter by making promotions out of rank order, with a goal of making minority promotions at a rate of 20% over the percentage of minority officers eligible for promotion. In 1990, using this system, 32 sergeants were promoted in rank order to the rank of lieutenant, and four were promoted out of rank order. After a similar analysis, the City officials decided to take the same approach to promotions from lieutenant to captain. They made 19 promotions to captain, of which 16 were in rank order and three were out of rank order.

## II

The City's efforts to increase minority representation among the lieutenant and captain ranks led in 1990 to lawsuits by three groups of plaintiffs, each alleging that the civil rights of white candidates for promotion had been violated by the various measures described here. The

plaintiffs brought suit pursuant to 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 alleging violations of the Equal Protection and Due Process Clauses of the 14th Amendment, as well as various state laws. In *Erwin v. City of Chicago*, the plaintiffs included approximately 220 sergeants who took the 1987 police lieutenant examination. In *Deloughery v. City of Chicago*, the plaintiffs were white lieutenants who took the 1987 police captain examination. In *Reynolds v. City of Chicago*, the plaintiffs were a separate group of white sergeants and lieutenants who took the 1987 police lieutenant and captain examinations. All three plaintiff groups brought suit against the City and various officials. On January 31, 1991, the district court consolidated the three cases for purposes of pre-trial proceedings.

The defendants raised the defense of qualified immunity by motion in both *Erwin* and *Deloughery*, but by an order of July 3, 1991, the district court rejected it on the theory that it was not ripe for decision. The court dismissed all claims in *Erwin* except for the plaintiffs' equal protection theory, under 42 U.S.C. § 1983, and it dismissed the state law claim in *Deloughery*, again allowing the equal protection claim to stand against the defendants in their individual capacities. On July 7, 1994, the officials who were sued individually in *Erwin*, *Deloughery*, and *Reynolds* filed a motion for summary judgment, once again raising the qualified immunity defense. The district court granted the motion with regard to all three cases on August 10, 1994, but the officials' victory was short-lived with respect to the 1990 promotions. On November 28, 1994, in response to the plaintiffs' motion to reconsider, the district court vacated its August 10th order. On January 23, 1995 the court issued an opinion granting summary judgment on qualified immunity grounds for the defendants with respect to the 1988 promotions and denying summary judgment for the 1990 promotions.

The key difference between the two, the court reasoned, was the Supreme Court's 1989 decision in *Croson*. The judge concluded that the record did not contain "enough factual evidence for us to independently determine that

[the City officials] complied with *Croson* to be entitled to qualified immunity." On March 21, 1995, the court denied the defendants' motion to reconsider. This appeal followed, on behalf of Mayor Richard M. Daley, Glenn Carr (Commissioner of the City Department of Personnel), Robert Joyce (Deputy Commissioner of the Department of Personnel), LeRoy Martin (former Superintendent of the CPD), Gerald Cooper (former Executive Assistant and General Counsel to the Superintendent of the CPD), Edward Brooks (former Deputy Superintendent of the CPD), Hubert Holton (former Commander of the CPD's Personnel Division), and Kelly Welsh (former Corporation Counsel).

## III

The Supreme Court has long held that public officials are entitled to some form of immunity from suits for damages. See *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982). This necessarily means that, within the area of immunity, the officials do not have to undergo the burden of litigation; they do not need to prove that they were "right" in order to enjoy the defense. To the contrary, qualified immunity shields government officials who are performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 817; *Supreme Video, Inc. v. Schauz*, 15 F.3d 1435, 1438-1439 (7th Cir. 1994). The inquiry focuses on the objective legal reasonableness of the action, not the state of mind or good faith of the officials in question. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). It is an objective test, as the Supreme Court recently reiterated, "precisely in order to permit the defeat of insubstantial claims without resort to trial." *Behrens*, 116 S.Ct. at 838 (internal quotations omitted).

Once a public official raises the defense of qualified immunity, the plaintiff bears the burden of proof on the

issue. *Clash v. Beatty*, 77 F.3d 1045, 1047 (7th Cir. 1996); *Gregorich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995); *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988). When considering a defense of qualified immunity, two questions are pertinent: first, whether the plaintiff has asserted a violation of a constitutional right at all, and second, whether the plaintiff has demonstrated that the applicable constitutional standards were clearly established at the time in question. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Eversole v. Steele*, 59 F.3d 710, 717 (7th Cir. 1995); *Zorzi v. County of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994). The key point for the second question is whether a reasonable person would have been on notice that her actions violated clearly established law. A plaintiff can establish this either by showing that a closely analogous case has already established both the right at issue and its application to the factual situation at hand, see *McGrath v. Gillis*, 44 F.3d 567, 570 (7th Cir. 1995), or by showing that the violation was so obvious that a reasonable person would necessarily have known about it. See *Clash*, 77 F.3d at 1048; *Rakovich*, 850 F.2d at 1214.

The first question, whether the police officer plaintiffs have alleged a denial of a constitutional right, is one that can be answered readily. Their complaints asserted that the City's use of a race-standardized promotion examination and their practice of making limited promotions out of rank order violated the Equal Protection Clause of the United States Constitution. As the Supreme Court implied in *Siegert*, *supra*, we apply the standard of Rule 12(b)(6) to the sufficiency of the allegations of a violation of a constitutional right in answering this question. (In *Siegert*, the Court concluded that Siegert's allegations, "even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution." 500 U.S. at 227. See also *id.* at 233-34.) Here, under the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993), and *Palmer v. Board of*

*Education of Community Unit School District 201-U, Will County, Illinois*, 46 F.3d 682, 688 (7th Cir. 1995), the plaintiffs alleged facts that stated a claim for purposes of § 1983 and the Constitution. Under these circumstances, we must go on to the second part of the immunity inquiry, because a determination whether the plan actually violated the Constitution would involve the very kind of extended procedures that the qualified immunity defense is designed to spare the defendants. See *Siegert*, 500 U.S. at 232.

The second question is whether it was clearly established in 1990 that, in the light of a prior judicial finding of discrimination, the use of numerical promotional goals for the promotion of minority police officers and the use of racially standardized test results violated the Equal Protection Clause of the 14th Amendment. The district court thought so, in light of the Supreme Court's decision in *Croson*. With respect, we disagree. We begin by reviewing *Croson* itself, and then we look to decisions from the Supreme Court and the lower courts after *Croson* to see what was and was not "clearly established" in its wake.

The question in *Croson* dealt with the constitutionality of the City of Richmond's plan requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount to one or more minority business enterprises. This was not a new subject for the Court, as Justice O'Connor's opinion for the majority in Part I noted. The earlier decisions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), although they addressed different kinds of minority set-aside programs, had not resolved the questions in the lower courts about the proper treatment and standard of review for all such programs. In the end, the Court concluded that it was difficult to tell whether the Richmond plan was narrowly tailored to remedy prior discrimination. *Croson*, 488 U.S. at 507. There did not "appear to have been any consideration of the use of race-neutral means

to increase minority business participation in city contracting," and the 30% quota was not "narrowly tailored to any goal, except perhaps outright racial balancing." *Id.*

A four-person plurality of the Court concluded with the statement that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." *Id.* at 509. (O'Connor, J., with Rehnquist, C.J., and White and Kennedy, JJ.) Three other members of the Court would have upheld the plan in its entirety. See *id.* at 528 (dissenting opinion of Marshall, J., joined by Brennan and Blackmun, JJ.) and 561 (dissenting opinion of Blackmun, J., joined by Brennan, J.). Justice Stevens disagreed with the basic premise that "a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong," *id.* at 511, although he agreed that the Richmond plan could not be justified as such a remedy. Only Justice Scalia expressly disagreed with the proposition that state and local governments could, in his words, "in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.' " *Id.* at 520.

One important indicium of how well established the law was in 1990, after *Croson*, is the way the courts handled analogous litigation. In the event, the lower courts after *Croson* did not find the lead opinion (which contained sections that spoke for the Court and other sections speaking only for varying pluralities), nor any of the other five published opinions, crystal clear. As a result, the Supreme Court itself returned to the subject in 1995, in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). Once again, the case gave rise to multiple opinions and a complex road-map for determining exactly what was the opinion of the Court and what reflected plurality views. See *id.* at 2101. Justice O'Connor's opinion in *Adarand* notes that a majority of the Court had agreed in *Croson* that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. *Id.* at 2110. It notes, however, that only one year after *Croson*,

the Court held, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), that the minority preference policies of the Federal Communications Commission did not violate equal protection principles. *Adarand*, 115 S.Ct. at 2111-2112. *Adarand* repudiated the *Metro Broadcasting* holding that intermediate scrutiny was the appropriate standard of review for "benign" racial classifications and held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 2113.

The *Adarand* Court was careful to distinguish between the type of scrutiny to which racially based programs are subject and the ultimate outcome of any inquiry. Justice O'Connor wrote that "we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Id.* at 2117 (internal quotations omitted). She continued:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise*, 480 U.S., at 167 (plurality opinion of Brennan, J.); *id.*, at 190 (Stevens, J., concurring in judgment); *id.*, at 196 (O'Connor, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

115 S.Ct. at 2117.

*United States v. Paradise*, 480 U.S. 149 (1987), which the Court cited with approval in the passage quoted above from *Adarand*, involved exactly the same kind of remedial measure that the Chicago Police Department used here. In *Paradise*, there had been a prior judicial finding that

the Alabama Department of Public Safety had systematically excluded African-Americans from employment in violation of the Fourteenth Amendment. Eleven years after that finding, the district court ordered the Department to use out of rank order promotions, as long as qualified African-American candidates were available, until the Department implemented an acceptable promotion procedure. That plan was even stricter than the one at issue in the present case, since it required a one-African-American-for-one-white promotion system. The judgment of the Court upheld the plan, even though the rationales of individual Justices voting for that result varied.

The lower courts, in light of the Supreme Court decisions over the years, have upheld a number of race-based programs similar to the one adopted by the CPD here. Several courts of appeals, post-*Croson*, have upheld the use of out of rank order promotions as a remedy in the face of a statistical disparity and a showing of past discrimination. See *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir. 1991); *Stuart v. Roache*, 951 F.2d 446, 448-49, 455 (1st Cir. 1991); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-48 (9th Cir. 1989); *Edwards v. City of Houston*, 37 F.3d 1097, 1102-03, 1115 (5th Cir. 1994), *vacated and remanded*, 78 F.3d 983 (5th Cir. 1996) (5th Circuit vacated consent decree after reversing district court's denial of several motions to intervene in underlying case). Courts have also held that a compelling state interest can be demonstrated by the use of statistical evidence of present discrimination plus a history of entry-level and promotional discrimination. See *Stuart v. Roache*, supra; *Vogel v. City of Cincinnati*, 959 F.2d 594, 596-97, 601 (6th Cir. 1992) (statistical evidence alone could prove a compelling state interest that underlies a permissible affirmative action plan). A number of courts have found that the specific remedy of out of rank order promotions is "narrowly tailored." *Edwards v. City of Houston*, 37 F.3d at 1115; *Vogel v. City of Cincinnati*, 959 F.2d at 601; *Stuart v. Roache*, 951 F.2d at 455.

Finally, this Court's recent decision in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), underscores the complexity of the decisions facing public officials in this area. In *Wittmer*, the question was whether the State of Illinois could make racially based out of rank order promotions to the rank of lieutenant in a minimum security "boot camp" for nonviolent male criminals between the ages of 17 and 35. In the exceptional context of these "boot camps," the Court concluded that the State satisfied the demanding standard of justification established by *Adarand* to support its decision that at least some African-Americans needed to be in positions of authority for the program to succeed. In so holding, the Court also made clear that "rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions." *Id.* at 919.

Whatever else one might say about the state of the law in 1990 on affirmative action programs, the standard of review to which they are subject, and the nature of the justifications that will support them, it is clear that as of the time the City officials implemented their promotion program it was not "clearly established" within the meaning of *Harlow*, *Siegert*, and *Rakovich* that the use of standardization techniques and out of rank order promotions in police departments was illegal. Indeed, it may not be illegal at all. It is possible that the 1990 promotion procedures challenged in the underlying litigation will pass the current legal tests, or they may not. The litigation against the City itself is still before the district court, and the police officers will have an opportunity to make their case there. The City officials before us in this appeal, however, are entitled to qualified immunity from suit.

We therefore REVERSE the decision of the district court and REMAND for the dismissal of the City officials.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

**UNITED STATES COURT OF APPEALS**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

September 18, 1996

*Before*

Hon. **WILLIAM J. BAUER**, *Circuit Judge*

Hon. **DIANE P. WOOD**, *Circuit Judge*

Hon. **TERENCE T. EVANS**, *Circuit Judge*

| | |
|---|---|
| ANN ERWIN, DWIGHT BLEKE, RICHARD MOELLER, *et al.*, *Plaintiffs-Appellees*, Nos. 95-1932, 1933, & 1934 *v.* RICHARD M. DALEY, GLEN CARR, KELLY WELSH, *et al.*, *Defendants-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Nos. 90 C 950, 90 C 1923 & 90 C 5456 **Paul E. Plunkett**, *Judge.* |

## ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by counsel for plaintiffs-appellees Erwin and DeLoughery in the above-entitled appeal on August 21, 1996, no[1] judge in regular active service has requested a vote on the suggestion for rehearing *en banc*, and all judges on the original panel

[1] Judge Ilana Diamond Rovner took no part in this decision.

have voted to DENY the petition for rehearing. Accordingly,

IT IS ORDERED, that the aforesaid petition for rehearing be, and the same is hereby DENIED.

BEST AVAILABLE COPY

Minute Order Form (rev. 12/90)

**UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS**

| Name of Assigned Judge or Magistrate Judge | PLUNKETT | Sitting Judge if Other Than Assigned Judge | |
|---|---|---|---|
| Case Number | 91C 668 (90C 1923; 90C 5456 and 90C 950) | Date | Jan. 23, 1995 |
| Case Title | IN MATTER OF CHGO. POLICE OFFICER PROMOTIONS | | |

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

JAN 27 1995

JAN 30 1995

Filmed on

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling / ☐ Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf. ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) [X] [Other docket entry] ENTER MEMORANDUM OPINION AND ORDER: The Defendants' motion for summary judgment is granted in part and denied in part. As to the individual Defendants associated with the 1988 lieutenant promotions, their motion for summary judgment based on qualified immunity is granted. As to the individual defendants associated with the 1990 promotions, their motion for summary judgment based on qualified immunity is denied.

(11) [X] [For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.]

| | | |
|---|---|---|
| [X] No notices required, advised in open court | | number of notices |
| ☐ No notices required. | | |
| ☐ Notices mailed by judge's staff. | 1-27-95 | date docketed |
| ☐ Notified counsel by telephone. | (LMJ) | docketing dpty. initials |
| ☐ Docketing to mail notices. | | |
| ☐ Mail AO 450 form. | | date mailed notice |
| ☐ Copy to judge/magistrate Judge. | | |
| courtroom deputy's initials | Date/time received in central Clerk's Office | mailing dpty. initials |

Document # 42

App. 15

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| **In the Matter of Chicago Police Officer Promotions** | **No. 91 C 668** |
| | **Honorable Paul E. Plunkett** |
| **Consolidated Pre-Trial Proceedings** | **Deloughery v. City of Chicago** |
| | **No. 90 C 1923** |
| | **Reynolds v. City of Chicago** |
| | **No. 90 C 5456** |
| | **Erwin v. City of Chicago** |
| | **No. 90 C 950** |

## MEMORANDUM OPINION AND ORDER

This matter is before this Court for purposes of the consolidated pretrial proceeding for the following cases: (1) *Deloughery v. City of Chicago*, No. 90 C 1923; (2) *Erwin v. City of Chicago*, No. 90 C 950; and (3) *Reynolds v. City of Chicago*, No. 90 C 5456. Plaintiffs have sued the City of Chicago, as well as certain City government officials in their individual capacity, for reverse discrimination. In their respective complaints, Plaintiffs allege that the City's use of standardized test scores as a basis for aiding minorities with the 1988 and 1990 lieutenant and captain promotions was racial discrimination. The individual Defendants[1] now seek summary judgment on the ground

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[1] The individual defendants fall into two groups individuals involved with the 1988 promotions and individuals involved with the 1990 promotions. *See infra*, f.n. 10.

that they are entitled to qualified immunity. Fed. R. Civ. P. 54(c)(1) (1994).

## Background

For nearly two decades, the Chicago Police Department promotion process has been entwined in litigation involving allegations of discrimination.[2] Certain aspects of this history is relevant to the motion at hand. Therefore, a brief recitation of this history is required.

In Bigby 1980, black male sergeants sued the City of Chicago, asserting that the lieutenant's exam used in 1977, which was used to determine eligibility for the promotion from sergeant to lieutenant, had a disparate impact on blacks in violation of Title VII. *Bigby v. City of Chicago*, 870 F.2d 1256, 1256-57 (7th Cir. 1989). In 1984, the district court ordered some immediate promotions of black sergeants to the rank of lieutenant and directed the parties to work out a new test. *Id.*

The parties jointly developed a new lieutenant exam, and in 1987 the City administered that new exam. The parties were not however satisfied with scores received by the minorities and decided to standardize the scores to

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[2] For additional background discussion see the following Seventh Circuit opinions, *United States v. City of Chicago*, 1991 WL 270769 (7th Cir. Ill.); *United States v. City of Chicago*, 894 F.2d 943 (7th Cir. 1990); *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989); as well as this court's prior decision in this case, *Chicago Police Officer Promotions, Consolidated Pretrial Proceedings*, No. 91 C 669, July 3, 1991.

create the promotion list.[3] *Id.* The parties created a promotion list based upon the standardized scores and subsequently sought court approval to promote officers from the list to the rank of lieutenant. The district court approved the promotions, but never addressed the issue of the appropriateness of the standardization.[4] *Id.* Additionally, the parties never inquired as to the lawfulness of the standardization process. *Id.* The City's police captain exam and promotion of captains, other than in the present case, has never been the subject of a discrimination case. (Pls.' 12(n) Stmt. at 9.)

At issue in the motion before this Court is the City's standardization of the 1987 lieutenant and captain test

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[3] The City standardized scores by rater and by race (black and hispanic were grouped together) to aid minorities in getting into the pool of applicants for promotion to lieutenant and captain. (Defs.' 12(m) Stmt. ¶ 50.) A rater was one of the individuals who evaluated a candidate. Each rater assessed certain candidate's oral skills, ability to support their answers, and overall suitability for promotion. (Defs.' Ex. O, ¶¶ 15-16.)

Standardization of test scores is a two step process. First, scores are converted into Z Scores (or standard scores) which gives a candidate a relative standing within his or her own group. Next, these scores are calculated using the following formula: Standardized score = (Z score x standard deviation) + Mean. (Defs.' Rule 12(m) Stmt. ¶¶ 49-51.) The City simultaneously standardized scores by rater and race (blacks and Hispanics were ranked together).

[4] To date, neither a lower court in this district nor the Seventh Circuit has addressed the legality of the City's standardization of the 1987 exam scores. *United States v. City of Chicago*, 894 F.2d 943, 943-44 (7th Cir. 1990); *U.S. v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989); and *Bigby v. City of Chicago*, 951 F.3d 352 (7th Cir. 1992).

scores in order to aid minorities with the 1988 lieutenant promotions and the 1990 lieutenant and captain promotions. (Pls.' 12(n) Stmt. at 2, Deft.s' Ex. R at 2. The *Erwin* and *Deloughery* Plaintiffs challenge both the 1988 and 1990 lieutenant and captain promotions.[5] (Third Am. Compl. ¶¶ 32-33, 38-39, 41-42, 44). The *Reynolds* Plaintiffs challenge only the 1990 lieutenant and captain promotions. (*Id.*)

## Discussion

It is well established that summary judgment is the proper manner to resolve an issue of qualified immunity because it allows government officials to perform their duties free from the wrath of most civil liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982). Once a defendant has invoked the doctrine of qualified immunity, the plaintiff must show that the law alleged to have been violated was sufficiently clear that a reasonable official would understand that his conduct violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). Where a plaintiff alleges a constitutional violation, the constitutional standard must be clearly established at the time the alleged violation occurred. *Hill*, 992 F.2d at 717; *Fiorenzo v. Nolan*, 965 F.2d 348, 351-52 (7th Cir. 1992); *Auriemma v. Rice*, 910 F.2d 1449, 1453 (7th Cir. 1990) (*en banc*), *cert. denied*, 111 S. Ct. 2796 (1991). It is plaintiff's burden to show that the

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[5] As to the 1988 captain promotions, the *Erwin* and *Deloughery* plaintiffs only assert claims against the City of Chicago and not any government individual. (Pls.' Rule 12(n) Stmt. ¶ 2.) Therefore, there is no qualified immunity issue concerning the 1988 captain promotions.

defendant's conduct was clearly in contravention to existing law. *Colaizzi v. Walker,* 812 F.2d 304, 308 (7th Cir. 1987). A court is to look at the "objective reasonableness of [an official's] conduct as measured by reference to clearly established law." *Davis v. Scherer,* 468 U.S. 183, 189 (1984) (quoting *Harlow,* 457 U.S. at 818).

## I. Whether the Individual Defendants Considered the Applicable Law Prior to Promoting Officers in 1988 and 1990, Using a Race-Based Affirmative Action

Although both parties chose to address the 1988 and 1990 promotions together, in their respective discussions of the law, this ignores the very essence of qualified immunity law, which is the need to focus on the relevant time period for the allegedly unlawful conduct. Therefore, qualified immunity law dictates that this Court consider the 1988 and 1990 promotions and applicable law separately.[6]

In 1988 the applicable standard for affirmative action was the disparate impact standard of Title VII analysis. *Richmond v. Croson,* 488 U.S. 469 (1989); *Cygnar v. City of Chicago,* 865 F.2d 827 (7th Cir. 1989). In January 1989, at least a year before the 1990 promotions, the applicable law controlling the review of a local government's affirmative action plan dramatically changed to the standard of strict scrutiny. *Croson,* 488 U.S. 469.

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[6] Furthermore, addressing the promotions separately by year also makes sense because the 1988 and 1990 promotions involved two different groups of defendants.

**A. The use of Title VII analysis in reviewing local government affirmative action plans, prior to the Supreme Court's decision in Richmond v. Croson.**

In 1988, in the context of Title VII analysis, evidence of "gross statistical disparities" alone was sufficient proof of a pattern or practice of discrimination. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-08 (1977). *See, e.g., Johnson v. Transp. Agency,* 480 U.S. 616, 632 (1987); *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650-51 (1989). Furthermore, courts scrutinized the impact of examinations on minority employment. Examinations that resulted in a selection pattern substantially different from the pool of applicants was deemed *prima facie* evidence of discrimination. *Albermarle Paper v. Moody,* 422 U.S. 405, 425 (1975); *Shidaker v. Tisch,* 833 F.2d 627, 630 (7th Cir. 1986). Similarly, under Title VII, evidence of a disparate impact between the available pool of employees and the existing rank was enough justification to employ an affirmative action plan. *Albermarle,* 422 U.S. at 425; *Shidaker,* 833 F.2d at 630; *Castenada v. Pastida,* 430 U.S. 482, 496 n.17 (1977); *Kirkland v. New York State Dep't of Correctional Serv.,* 711 F.2d 1117, 1128 (2d Cir. 1983); and D. Baldus and J. Cole, *Statistical Proof of Discrimination,* § 9.02 (1980). In 1989, lower courts applied the Title VII standard to both Title VII and equal protection attacks on a local government's affirmative action plans. *Cygnar v. City of Chicago,* 865 F.2d 827, 834 (7th Cir. 1989). The Seventh Circuit deemed "a manifest imbalance" in racial

composition sufficient evidence of prior discrimination in equal protection cases.[7] *Cygnar*, 865 F.2d at 834.

### B. The emergence of the Supreme Court's decision in Richmond v. Croson and its impact on affirmative action plans.

In 1989, the Supreme Court discarded its use of the Title VII standard when analyzing state and local government affirmative action plans, and adopted the strict scrutiny standard. *Richmond v. Croson*, 488 U.S. 469 (1989). The *Croson* decision has had a tremendous impact on subsequent judicial evaluation of public sector affirmative action efforts, as well as the structuring of such plans.[8] *See, Croson*, 488 U.S. 469 (1989); and Janice R.

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[7] In *Cygnar*, the Seventh Circuit stated that under the Equal Protection Clause an affirmative action plan required more than a personal perception of prior discrimination, but the Court stopped short of requiring strict scrutiny analysis and settled on "a manifest imbalance" between the minorities in the relevant labor pool and the minorities in the ranks must indicate a manifest imbalance. *Cygnar*, 865 F.2d at 834. The *Cygnar* decision however preceded the Supreme Court's *Croson* decision by several months. Since *Croson*, the Seventh Circuit has recognized that a strict scrutiny analysis would apply to its review of a local government's affirmative action plan. See, *City of Chicago*, 870 F.2d at 1260 (citing *Croson*, 488 U.S. 469).

[8] In *Croson*, the Fourth Circuit found the City of Richmond's set aside plan valid. The Fourth Circuit evaluated Richmond's plan using the Supreme Court's analysis of Congress' set-aside program in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (applying Title VII analysis). The Supreme Court vacated the Fourth Circuit's decision and remanded the case for reconsideration in light of its intervening decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, the

Franke, *Defining the Parameters of Permissible State and Local Affirmative Action Programs,* 24 Golden Gate U. L. Rev. 387 (Spring 1994). The *Croson* decision was significant because it was the first time a majority of the Court set strict scrutiny as the standard of review for assessing the constitutionality of state and local race-based affirmative action directives.[9] *Croson,* 488 U.S. 469. After *Croson,* it became clear that the lower Title VII standard would be reserved for remedial acts by Congress. *Id.* Although no justice's opinion stated a generally applicable formula concerning what quantum of evidence was necessary to justify the use of affirmative action, the Court emphasized that a state or local government must possess " 'a strong basis in evidence for its conclusion that remedial

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Fourth Circuit read *Wygant* as requiring a state or local public entity's affirmative action efforts to be based *on a showing of past discrimination* by the acting entity and the means adopted to be narrowly tailored to remedy the remaining effects of that discrimination, and concluded that the Richmond plan failed to meet either requirement. *Croson,* 448 U.S. at 469-70. (Emphasis added.) In a plurality opinion, the Supreme Court affirmed the Fourth Circuit. *Croson,* 488 U.S. 469.

[9] Four Justices agreed that Congress' remedial affirmative action powers are broader, and thus subject to less stringent judicial review, than similar measures undertaken by state or local governments. These justices distinguished programs mandated by Congress from those undertaken by states and other local government entities. *Id.* Since the *Croson* decision, Justice Brennan stated in *Metro Broadcasting Inc. v. F.C.C.,* 487 U.S. 547 (1990), that much of the language and reasoning in *Croson* reaffirmed the Court's prior lesson "that race conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting,* 487 U.S. at 565.

action was necessary.' " *Croson*, 488 U.S. at 501 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). In assessing whether a governmental unit has a "strong basis in evidence" for imposing race-conscious relief, the proffered evidence must "approach[ ] a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500.

After *Croson* in order for an affirmative action plan to survive strict scrutiny, a state or local government was required to show a compelling governmental interest of prior discrimination with prima facie evidence of prior discrimination. *Croson*, 488 U.S. at 509 (plurality). Additionally, a lower court is required to make a particularized finding of prior discrimination because "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. With these standards in mind we now turn to our analysis of the 1990 and 1988 promotions.

## II. The 1990 and 1988 Police Promotions

The individual Defendants involved with the 1988 and 1990 promotions contend that they are entitled to qualified immunity because: (1) the law regarding affirmative action plans in 1988 and 1990 was unclear; and (2) the standardization of the 1987 test scores was part of the prior history of police promotion litigation. We consider each of these arguments in turn.

**A. The individual Defendants involved with the 1988 promotions.**

As to the individual Defendants[10] associated with the 1988 promotions, our inquiry into whether they receive qualified immunity is limited to the Title VII standard of disparate impact. *See Cygnar,* 865 F.2d 827 (analyzing defendant's request for qualified immunity by using the disparate impact law as it existed in 1984 the time of the allegedly unlawful conduct and not 1989.)

In *Cygnar,* under Title VII analysis, even a government official's personal perceptions that a disparate impact existed between the available pool of employees and the existing rank was sufficient to employ an affirmative action plan. *Albermarle Paper,* 422 U.S. at 425; and *Shidaker,* 833 F.2d at 630; *Castenada,* 430 U.S. at 496 n.17; *Kirkland,* 711 F.2d at 1128.

Relying on Title VII standards, the Defendants argue that "[a]t the time [the] challenged promotions were made, there were gross disparities between the actual number of minorities at the rank of captain and lieutenant and the expected number of minorities based on the percentage of the qualified labor pool." (Defs.' Mem. at 3.) The Defendants assert that the results of their chi square analysis show that the disparity in test results are

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[10] As for the 1988 promotions, the individual defendants are Eugene Sawyer, Jesse Hoskins, Robert Joyce, Judson Miner, and Bridget Arimond. The individual defendants associated with the 1990 promotions are Richard M. Daley, Glenn Carr, Robert Joyce, Leroy Martin, Gerald Cooper, Edward Brooks, Hubert Holton and Kelly Walsh.

significant enough to support the inference of discrimination. They contend that the results of the 1987 examinations made it clear that the test resulted in a selection pattern substantially different from the pool of applicants. (Defs.' Mem. at 18.) Defendants conclude that the examination results show a selection pattern substantially different from the pool of applicants constitutes *prima facie* evidence of discrimination. (*Id.* at 18.)

Given the proof required to show disparate impact under Title VII and the Defendants' evidence of disparate impact in scores, (Defs.' Ex.s M-Y.), we conclude that in 1988, a government official would not have been known that relying on disparate impact to justify an affirmative action plan was unlawful. The individual Defendants involved with the 1988 promotions made a reasonable decision to use standardized scores for the 1988 promotions. Therefore, as to the individual Defendants associated with the 1988 lieutenant and captain promotions, their motion for summary judgment based on qualified immunity is granted.

The 1988 Defendants argue next that they are entitled to summary judgment because they reasonably believed their standardization of scores was action taken as an offshoot of the *Bigby* police promotion case. Having already concluded that summary judgment is proper, however, we do not need to reach the standardization issue as it pertains to the 1988 Defendants.[11]

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[11] We do however consider the relative close proximity between defendants conduct and the decisions in the ongoing *Bigby* case relevant. (Defs.' Ex.s A-L.) Furthermore, as is discussed in greater detail below, the Defendants did not have

**B. The individual Defendants involved with the 1990 promotions.**

As to the individual Defendants involved with the 1990 promotions, we do not rely on Title VII standard. The 1990 promotions occurred after the Supreme Court's *Croson* decision, therefore it sets the applicable case precedent. It is clear after *Croson*, that an equal protection claim against a local government's affirmative action plan is subject to strict scrutiny analysis. In order for an affirmative action plan to survive strict scrutiny, a state or local government was required to show a compelling governmental interest of prior discrimination with prima facie evidence of prior discrimination.[12] Yet, in their motion, the Defendants ignore *Croson*. They do not address why we should not apply the strict scrutiny standard announced in *Croson* to the 1990 promotions. Additionally, they do not present enough factual evidence for us to independently determine that they complied with *Croson* to be entitled to qualified immunity.

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the benefit of the Seventh Circuits decisions stating that the standardization issue had never been decided.

[12] Furthermore, several decisions in this circuit after the *Croson* decision reveal that by 1990 defendants were required to take a fresh look at the discrimination problem in the Chicago police promotions. *U.S. v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989); *U.S. v. City of Chicago*, 894 F.2d 943, 948 (7th Cir. 1990) (Easterbrook, J., concurrence). Judge Posner stated, "The argument of [reverse discrimination] has considerable force . . . especially now that reverse discrimination is subject to strict scrutiny." *City of Chicago*, 870 F.2d at 1260 (citing *Croson*, 488 U.S. 469). And, Judge Easterbrook suggested a change in times has occurred which should be recognized. 894 F.2d at 948-49.

In 1990, no government official could have reasonably believed that he or she could implement a race-based affirmative action directive without first considering *Croson* and relevant Seventh Circuit decisions. To grant summary judgment to the individual Defendants associated with the 1990 promotions would allow government officials to ignore Supreme Court standards which were nearly two years old.[13] Additionally, to grant summary judgment here would allow government officials to ignore evolving Seventh Circuit case law. Accordingly, as to these Defendants, their request for summary judgment based on qualified immunity is denied.

The 1990 Defendants argue next that they are entitled to summary judgment because they reasonably believed that use of standardized scores was action taken as an offshoot of the *Bigby* police promotion case. While this argument may have credence as to the 1988 promotions, it must fail as to the 1990 promotions. A review of the relevant case law informs us that the standardization issue was not part of the prior *Bigby* case. *U.S. v. City of Chicago*, 1991 WL 270769 (7th Cir. 1991); *U.S. v. City of Chicago*, 894 F.2d 943 (7th Cir. 1990); *U.S. v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989). In fact, the Seventh Circuit has on at least one occasion expressly stated that the standardization issue was not decided. *City of Chicago*,

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[13] Furthermore, the defendants state that one consideration for their decision to standardize test scores was *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. (1985). (Defs.' 12(m) ¶ 36.) Thus, this Court concludes that it is not too strenuous of a burden to require the defendants to at least consider developing Supreme Court precedent.

894 F.2d at 948 (7th Cir. 1990). Therefore, in 1990, a government official could not reasonably believe that his or her action was authorized by the *Bigby* suit. Accordingly, as to the Defendants associated with the 1990 promotions, we also deny their request for summary judgment based on their assertion that the standardized scores were related to the prior police promotion cases.

Defendants also offer as a rationalization for their decision to standardize scores that, given the specific facts and case law associated with the police promotion cases, if "the City used the results of the test in rank order without ameliorating the test's adverse impact, [the City] would have been charged with using a promotional device that had illegal discriminatory effect against minority candidates." (Defs.' Mem. at 22.) The new test revealed scores that minority scores were lower than desired for by the City and the parties decided to discard the idea of starting over with a new exam (apparently because of cost). (Defs.' 12(m) Stmt. ¶¶ 40-41.) Instead, the Defendants decided that racial standardization would eliminate any adverse impact that the test had on minorities. The effect of the standardization was an increase of black candidates on the promotion list. (Pls.' 12(n) Stmt. ¶¶ 1620.) The Defendants ignored the requirements of *Croson*. Therefore, the Defendants are not entitled to qualified immunity on this basis, either. As to the 1990 Defendants, their request for summary judgment is denied.

Both groups of Defendants also maintain that they are entitled to summary judgment because they did not act with the requisite intent to discriminate. As early as 1979, the Supreme Court stated that race-based classifications are *per se* evidence of intent. *See, Personnel Adm'r of*

*Mass. v. Feeney*, 442 U.S. 256 (1979). Both groups of Defendant admit however that the standardization process was done to counteract the adverse impact the 1987 examination had on minority applicants. Therefore, the standardization of test scores involved race-based classification. Accordingly, this argument fails as a basis for granting summary judgment.

## Conclusion

The Defendants' motion for summary judgment is granted in part and denied in part. As to the individual Defendants associated with the 1988 lieutenant promotions, their motion for summary judgment based on qualified immunity is granted.[14] As to the individual Defendants associated with the 1990 promotions, their motion for summary judgment based on qualified immunity is denied.[15]

ENTER:

/s/ Paul Plunkett
UNITED STATES
DISTRICT JUDGE

DATED: January 23, 1995

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[14] This involves individual defendants Eugene Sawyer, Jesse Hoskins, Robert Joyce, Judson Miner, and Bridget Arimond.

[15] This involves individual defendants Richard M. Daley, Glenn Carr, Robert Joyce, Leroy Martin, Gerald Cooper, Edward Brooks, Hubert Holton and Kelly Walsh.

List of Petitioners of the Parties
to the Proceedings

Jesse R. Acosta
Frank L. Aguinaga
Richard L. Allen
Martin A. Anderson
Lawrence C.
Augustine Jr
Richard M. Aztlan
Gary Baranowski
Thomas J. Barnett
Anthony J. Barry
Thomas E. Becker
Ronald Bellavia
John E. Berry
Joan C. Biebel
Quentin C. Black
Curtis E. Blanc
Dwight L. Bleke
Robert W. Bokowski
Fred O. Bonke
Emmett A. Boyd
Patrick J. Brannigan
Robert M. Bresnahan
Don L. Brooks
Harold L. Brooks
Andrew J. Brooks Jr
Timothy J. Brophy
James E. Brown
John H. Brown Jr
Melvin L. Bynum
Frank J. Cappitelli
Frank T. Cascio
Thomas A. Chandler
Robert M. Chernik
John C. Chojnacki
Willie C. Cobb Jr
James E. Cole
Darryl D. Collins
Stephen E. Conner
Gregory R. Courchene
Samuel J. Crawford
Wade D. Crosson
Phillip C. Cunningham
Joseph M. D Antonio
Cornelius P. Dalton
Joseph P. De Franco
John F. De Lafont
Angelo F. Del Marto
Joseph J. Delapaz Jr
James P. Devereaux
Michael Drozdek
Terrence L. Dunn
Dennis C. Eichler
Richard L. Engelsman
Lee Epplen
Ann D. Erwin
James V. Esposito Jr
Ernest Evans
Terrence T. Fahey
Patrick Fanella
Marsha S. Feldman
James Finlayson
Roseann C. Fitzgerald
Robert Fitzgibbons
Michael C. Flynn
Keith J. Fowler
Louis J. Frazer
Robert A. Friedman
Thomas P. Fuller
Joseph F. Gandurski
William L. Gates

Raymond R. Gawne
Robert J. Gienko
Lionel C. Gordon
Patrick F. Gordon
James J. Gorman Jr
William J. Graham
Johanna Hamel
Edward P. Hanlon
Larry Hargrove
Thomas J. Harris
Joseph B. Hartford
Patrick F. Heenan
Ashley H. Henderson
James Henderson
John R. Hickey
Abraham J. Hite
Norbert H. Holzinger
Raymond J. Howe
Thomas R. Hutchinson
Katherine Ingram
Stephen J. Jackson Jr
Jesse P. Jacobs
Donald F. Januszyk
John M. Jarvis
Frank T. Jasch
Everett L. Johnson
Juanita Johnson
Ronald L. Johnson
Mary J. Jones
William H. Jones
Joseph E. Joria
Edward M. Kane
Alexander Karas
Richard J. Karceski
John F. Kelly
John P. Kelly Jr
John W. Kerlin
Thomas M. Kocur
Donald R. Koplitz
Leonard Koplitz
David Kristovic
Ka Nam Kuan
James G. Kulekowskis
Robert P. Kwiatkowski
John J. Lamb
Donald W. Larisey Jr
Brian P. Lendzion
Thomas J. Leonard
Chris Lewis Jr
James A. Linzy
Charles R. Loftus
Robert M. Lombardo
Mark J. Madden
Raymond D. Madigan
Gerard Mahnke
Richard R. Majder
Robert M. Maloney
Joseph M. Maratto
Bernard V. Martin
Benero Martinez
Jose R. Martinez Jr
Albert Mc Caffery Jr
Edward Mc Closkey
James P. Mc Donnell
John M. Mc Givney
James F. Mc Govern
Bennett L. Mc Gowan
Gregory R. Mc Hugh
James T. Mc Kittrick
Michael Mc Mahon
Richard A. Moeller
Alphonso Montes Jr
William J. Morley
Dennis J. Mulcahy

Richard Munkvold
William F. Murray
Willie J. Neal
Linda L. Nelson
Richard W. Nelson
Dario A. Nomellini
Richard L. Norris
John W. Northen Jr
David J. O Callaghan
Mary E. O Connor
Gary C. O Hara
Edward O Reilly
James A. O Rourke
Charles J. Oliver
Felix A. Olivieri
Arilee Owens
Donna Pacanowski
Michael J. Pagano Jr
George Papagiannis
George J. Parich
Manuel J. Perez
James P. Peterson
Ricardo C. Pina
Robert Pistilli
Anthony R. Priola
Sylvia A. Quinn
Theodore E. Raab
Will Redmond
Thomas K. Reilly
Jesse Resendez Jr
Kenneth Restis
Thomas P. Reynolds
John W. Ridges Jr
Patricia Riegler
John J. Roberts
Michael T. Rogers
William E. Ross
John J. Rubel Jr
Edward J. Ryan
John C. Salyers
James M. Sandow
Gerald J. Satala
Gerald A. Saternus
Nicholas J. Schuler
David W. Schweiger
Joseph A. Sepulveda
Ann M. Shaw
Sterling W. Shaw
Stephen L. Sherwin
William H. Silk
Barry Slappey
William M. Smith
Raymond Soltys
Charles E. Springer
Thomas M. Stevens
William Stevens
Robert W. Suess
Paul L. Tasch Jr
Michael J. Thomas
James R. Turney Jr
Terrence N. Urbaniak
Charles M. Urgo
Richard B. Valela
Dennis N. Valentine
Jeffrey S. Vana
Robert C. Vanna
Monroe J. Vollick
Robert A. Wagner
Harry J. Wallace
James Waltemath
John A. Ward
James E. Webb
Joel Westbrook
William Whelehan

Charles M. White
Roberta Wielgus
Louis E. Wilcox
Robert Wilkinson
Vernon B. Williams
Michael J. Williamson
Kenneth Willingham
Charles T. Wippo
John C. Wolanski
Bradford L. Woods
Ralph G. Yellowlees
Chris Zaglifa
Robert W. Zdora